

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

77-1308

*To be argued by
Irving Anolik*

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,
Appellee,
against

EUGENE COREY,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK.

DEFENDANT-APPELLANT'S BRIEF.

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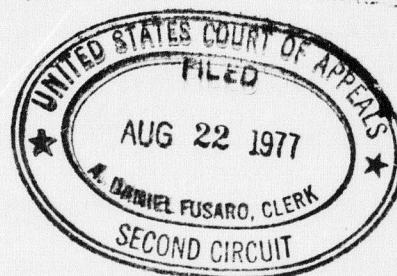


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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

Docket No. 77-1308.

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UNITED STATES OF AMERICA,

Appellee,

v.

EUGENE COREY,

Defendant-Appellant.

- - - - -X

DEFENDANT-APPELLANT'S BRIEF.

STATEMENT.

The defendant-appellant, Eugene Corey, has appealed to this Court from a judgment of the United States District Court for the Southern District of New York, rendered the 1st day of July, 1977, convicting him of mail and wire fraud and a conspiracy with respect thereto. Defendant-appellant was sentenced to one year imprisonment on each of three counts, One, Two and Seven, to run concurrently with each other and he was continued on bail pending the determination of this appeal.

INTRODUCTORY.

The Government predicated its case upon mail fraud and wire fraud and a conspiracy with respect thereto, based largely upon the testimony of two main witnesses, namely George Barney and Donald H. Krasner, both of whom were co-defendants and accomplices.*

Each of the accomplices testified at the trial, admitting what amounted to commercial bribery or "kick-backs" with respect to transactions that they had had with Eugene Corey when he was employed by the Hartz Mountain Corporation in charge of date processing.

Both Barney and Krasner supplied materials, but also admittedly had conferred from time to time with Corey concerning technical problems which they encountered. Additionally, Corey testified that he had rendered consultant services to both these individuals and had also helped them find new customers because of his vast knowledge of this field.

There was never any denial on Corey's part that he had received some money in the form of checks from Krasner, who operated under the title of "Commercial Forms, Inc." He also conceded that he had received one check, after termination of his employment with Hartz, from

* They did not go to trial since they pleaded guilty to other charges before testifying.

Barney. He denied having received cash. Corey declared these payments as income and paid taxes thereon.

Through his testimony, Corey steadfastly denied that he had ever taken a bribe or a kickback, but claimed that these payments were in consideration of non-conflicting services rendered in connection with consultation and finding business with non-competing firms for the payors.

During the course of trial, counsel for the defendant-appellant inquired of the U. S. Attorney as to whether or not Corey had any criminal background and whether he had ever committed a crime. The responses were in the negative. After Corey took the stand and testified on direct, the Government, for the first time, revealed that it intended to examine him with respect to an alleged crime which he had committed while working at CBS, which, however, had not resulted in a conviction. The crime allegedly involved an overstatement of overtime. It had occurred about 17 years earlier, in 1960. Over objection and a motion for mistrial, the Court permitted the questions.

In addition, the Government further prejudiced the defendant-appellant by injecting into a question on cross-examination, the fact that over 25 years earlier Corey had changed his name from "Cohen" to Corey. This, too,

was obviously designed to prejudice the minds of the jurors and might even have injected religious overtones into the case, for no earthly reason.

It became obvious to all that there was nothing at all connected with this case, or any impropriety, that had caused the name change. The Trial Judge had no recourse but to direct Corey to explain the name change, because to merely instruct the jury to disregard it would have made matters worse.

Another aspect of error was the fact that the nature of the crime being commercial bribery, should not have been brought in the Federal Court since only by strained and contrived reasoning did this purely State offense come within the mail and wire fraud provisions of Title 18 United States Code.

THE EVIDENCE AT TRIAL.

The evidence at trial, as we have indicated in the Introductory, came primarily from the lips of two accomplices, namely George Barney and Donald H. Krasner.

Barney was President of "Tabulating Stock Forms, Inc.," while Krasner was President of "Commercial Forms, Inc." Both of these individuals had been named as co-defendants, admitting other fraudulent practices with unrelated firms over the years. They supplied computer

paper, stock forms, and other paper products to a number of firms, including Hartz Mountain Corporation, wherein Corey was a Vice-President.

The testimony of both Krasner and Barney was completely predicated upon their desires to help themselves in their forthcoming sentences since they had already pleaded guilty to certain violations and were cooperating with the Government.

Their testimony, therefore, was highly suspect.

There is no dispute, however, that Barney and Krasner separately testified that they had been paying "kick-backs" or commercial bribes to Corey, by direct cash payments and by check. Krasner produced a number of checks made out to Corey from his firm, which he claimed represented the payments involved.

Corey did not deny that he had received these checks and, moreover, admitted that he had dealt with both of these individuals. Krasner and Barney declared that they overbilled and undershipped on several occasions, which operation succeeded because Corey permitted them to do so since it was he who had to approve the bills.

Corey testified in his own behalf to the contrary, however, indicating that there was a vast corporate system of checks and balances as well as a separate receiving and billing department which would have to have checked the shipments and okayed the payments.

If the foregoing had been the only testimony, perhaps the only legal issue remaining would have been whether the crime charged was within the purview of Federal jurisdiction, or whether jurisdiction was contrived and strained.

In the course of the trial, however, the Government, obviously aware of the serious problems of credibility posed by the flat contradictions between the testimony of the two accomplices and Corey, overtried its case by injecting prejudicial error. At the beginning of the cross-examination, it appeared that the Government would restrict itself to the issues at trial. At 434 of the record, however, and for several pages thereafter, the Government suddenly notified the Court and counsel, for the first time, that Corey had been fired from CBS (Columbia Broadcasting System) way back in 1960, because he allegedly overstated the overtime pay due to him. No charges had ever been filed in a court of law and Corey was never convicted of any crime.*

In addition, the prosecutor at trial, for the first time, indicated that he would adduce evidence that Corey utilized the computers at Hartz Mountain at off-hours for personal business (434-438).**

* The prosecutor knew about CBS well in advance since they had prepared a memorandum previously which they gave to the Judge and defense counsel upon the objection to the testimony.

** Numerals in parentheses refer to pages of the official court reporter's minutes of trial, unless otherwise indicated.

The prosecutor admitted that he had been asked on a number of occasions, by trial counsel for Corey, whether Corey had ever been convicted of or committed any crimes. The trial Assistant U. S. Attorney (AUSA) conceded that he never mentioned anything about the CBS situation and the alleged crimes committed there by Corey.

At pages 437 and following, the colloquy revealed that Mr. Anolik, the defense counsel, had inquired of Mr. Cooney, the prosecutor, at least four times, as to the background of Mr. Corey, and was under the impression that he had nothing in the way of crimes or the like, with which to confront Corey. The CBS situation was 16 years old.

The colloquy before Judge Motley, *inter alia*, was as follows (438-440):

"MR. ANOLIK: . . .

"I asked Mr. Cooney on a number of occasions whether he intended to go beyond his employment at Hartz.

"While it is true Mr. Cooney was a little equivocal, he indicated to me that he would not go beyond Hartz.

"I think, your Honor, that this is in the nature of a *trial by ambush* and I object to it for that reason. This is 16 years ago. I

don't know the circumstances of this event, your Honor, to any great extent, but on something that is 16 years old, it should not be sprung.

"THE COURT: Are both events 16 years old?

"MR. ANOLIK: No, I am not even talking about the other event. The other event, your Honor, I was aware of and I don't care if he goes into that or not.

"MR. COONEY: Your Honor, May I just say --

"MR. ANOLIK: But the situation at CBS, which is more than 16 years old, I think is grossly unfair, your Honor, under the traditional rules in this circuit, even a conviction that was more than ten years old ordinarily would not be gone into, your Honor, and I just don't see the *Luck* doctrine and those doctrines, I just don't see why at this time Mr. Cooney should be permitted to suddenly spring something like this without any hint whatsoever that he intended to do it either to the Court or to defense.

"MR. COONEY: Let me just finish. I did not interrupt you, Mr. Anolik.

"MR. ANOLIK: I am sorry.

"MR. COONEY: Your Honor, with respect to trial by ambush, there is absolutely no question that this man voluntarily took the stand. The information that we have, if Mr. Anolik did not know about this, there is only one person to blame and that is this man who has come on to the stand voluntarily, to sell this jury on his clean background. There is no ambush occurring here. . . .

(441) "MR. ANOLIK: Your Honor, I regret that Mr. Cooney has to characterize something I say as false. I certainly never make statements knowingly false, your Honor.

"I asked Mr. Cooney on at least four occasions, as I am sure he recalls, whether any other crime -- I am not talking about a conviction now -- any other crime was committed by my client and he said 'No.'

"If he wants to use crime or conviction, maybe that was a mix-up in his head, but I was trying to get at something because of the fact that your Honor -- I happened to have the Baum case, U.S. v. Baum, where the Court of Appeals reversed the district court because it permitted trial by ambush in a particular case.

"THE COURT: Involving similar acts when you say trial by ambush?

"MR. ANOLIK: A similar act within a period of limitations or maybe within the period of conspiracy even I could understand, but something antedating that, your Honor, to me is just outside fundamental fairness. It is outside the ability of a man to even cope with, your Honor, without any hint.

"THE COURT: I am trying to understand what you mean by the term 'trial by ambush.'

"Do you mean surprise?

"MR. ANOLIK: Surprise in the sense of no forewarning, because I would have asked for a ruling from your Honor if Mr. Cooney had told me he was going into something like this. We know there is an obligation that where there is a conviction, he must notify us. We know that.

"However, your Honor, this is now just cutting it a little bit too thin in the sense that Mr. Cooney, I am sure, got the drift of what I was asking him. Maybe I was not articulate enough to pinpoint it, but I am always concerned when a man takes the stand about surprises.

(443) "I think that we don't try cases any more by surprises, your Honor. I don't think it is proper to try cases in that manner.

"I asked my man about everything he did at Hartz, I knew about the RPC and I am prepared for it. I didn't go back beyond 16 years, I saw no point in going back beyond that, your Honor. And whether or not my client will even-- I have not asked my client about this in deference to Mr. Cooney's request that I not, but the point is, I don't even have any background in it, your Honor, and I think that I am entitled to at least know what is going on, as I say, with respect to something of this sort before I even put a man on the stand.

"MR. COONEY: Let me just say this. On the Baum case, as I am sure Mr. Anolik knows, there was a request before trial for a list of witnesses in that case, the addresses of the witnesses.

"The government did not supply to the defense in that case the name of a similar acts witness who was put in as part of the direct case.

"Judge MacMahon was presiding, it was a one-day trial. There was a request when the similar act witness went on the stand, there was a request for adjournment.

* * *

(445) going to be heated and if he didn't inquire as to what this man did one month, one month before he came with Hartz Mountain, I don't see that that is ambush by the government.

"I just can't understand this contention of ambush, to be quite frank.

"MR. ANOLIK: Your Honor, I wonder why, and I think Mr. Cooney will agree that I asked him not once but several times, whether there was anything in this man's background that smacked of criminality.

"I may not have used those specific words.

"MR. COONEY: You certainly did not.

"MR. ANOLIK: But you know what my concern was. I was very concerned with his background, is that true?

"MR. COONEY: *You asked me several times, as best I recall, whether this man had ever committed a crime, whether he had been convicted,*

that type of thing, and I told you that there were no convictions, and I alerted you on several occasions.

"Last Friday was the last one, that you should inquire into his background, that you should especially inquire into what happened at Hartz.

"Your Honor, I am prepared, as I say.

"THE COURT: What happened at Hartz?

(446) "MR. COONEY: Yes, your Honor, that was this RPC.

"THE COURT: Not CBS?

"MR. COONEY: I did not tell him specifically about Columbia at that time.

"MR. ANOLIK: Your Honor, Mr. Cooney has correctly stated in substance that I did ask him about crimes, convictions, and I consider what happened at CBS a crime, your Honor. I think I should have been alerted to it. If for any reason I was not as articulate, I got a negative answer now, as I can see it. It is true, he now, as I recall, he had never been convicted.

"Now, your Honor, I just assumed that to mean he had never committed any other crime.

I was aware of what had occurred at Hartz, he told me he had authority to do this. I am prepared for that.

"This Columbia business comes like a bolt out of the blue, your Honor, and I think it is just fundamentally unfair in view of the fact that I made such searching inquiry of Mr. Cooney and it is true maybe I didn't articulate myself properly, Mr. Cooney.

"If I had asked you specifically about CBS, would you have told me about it?

*"MR. COONEY: I would have told you to inquire of (447) your client.**

"MR. ANOLIK: Why did you direct me to a point in time then? I concentrated entirely upon Hartz, your Honor, the framework of this indictment.

"Why should I have to go back now over 16 years and inquire of a client?

"MR. COONEY: Because, frankly, your Honor, because that is Mr. Anolik's job, before he puts a man on the stand. This man has presented himself in what we consider to be a fraudulent manner to this jury.

* It is obvious that the Government never intended to reveal CBS in advance.

"A month after he is fired from one company, he goes to another company and shortly thereafter, within five years, he is selling that company down the river. . . .

* * *

(448) "MR. ANOLIK: Your Honor, I think that at the very least Mr. Cooney should have come to your Honor in camera and told your Honor that this issue would come up. Not in the middle of cross-examination so suddenly (449) sprung it upon your Honor and me that that is going to come up when he obviously knew it was going to come up, because I *announced in advance that my client would take the stand, your Honor.*

"So this was no surprise to anyone.

"Your Honor will recall, I announced, perhaps on Thursday, that I intended to put my client on the stand, your Honor. *I did not play a cat and mouse game with the government at all and as I say to now suddenly spring this, I think is fundamentally unfair, when it goes back over 16 years.*

"If he wants to bring in RPC, I can deal with that, your Honor, and I am just saying if it is a tactic that the government wants to use, I think that tactic should be discouraged, your Honor.

"THE COURT: Let me ask you this. Are you familiar with any Second Circuit cases which rule out prior similar acts on the ground of time?

"MR. ANOLIK: Your Honor, I know that there are cases that rule out any sort of crime, be it similar act or otherwise, if it is over ten years old, if in the discretion of the Court, the Court does not want to admit it. That evolves from the U. S. v. Luck and that whole progeny of cases.

(450) "THE COURT: I don't have that in mind. I know that is now in the rules, I believe, the Rules of Evidence.

"MR. ANOLIK: That is correct.

"THE COURT: I am talking about prior similar acts.

"MR. ANOLIK: Your Honor, I cannot independently think of a case as such. This comes to me as a bolt out of the blue.

"MR. COONEY: Your Honor, obviously we have no problem with an instruction that this does not go to impeachment, this goes strictly to whether he knew what was going on and that is obviously the difference between remoteness in the impeachment area and remoteness in the similar acts area.

"MR. ANOLIK: *I would have to ask for a continuance to look into this matter. I have no knowledge of it. I would have to send out my investigator to check into it. I can't even cope with this, your Honor. I think this should have been called to your Honor's attention at the very least.*

"MR. COONEY: I will be glad to put on the record -- I talked to several people in my office this weekend when it was clear this man was taking the stand, (451) and it was also clear that his story would be as it has developed during cross that he did not know, on whether it would be proper for us to submit to the Court in camera information on prior similar acts.

"The general feeling in the office was given the context of this case that that would

not be proper. That when it was raised, if the issue came out as it so clearly did on cross-examination, it would have to be raised and litigated then.

"I apologize, I understand this puts some pressure on the Court, I apologize to Mr. Anolik in the general sense. Mr. Anolik and I have a very distinctly different recollection of our prior conversations.

"MR. ANOLIK: I really don't think it is that different. I think that we both-- Mr. Cooney was aware of the fact that I was concerned about this man's background in the event there was something I should know.

"MR. COONEY: And I alerted you on more than one occasion.

"THE COURT: Just a moment now. You are interrupting one another.

"MR. COONEY: I am sorry, your Honor, and--

"MR. ANOLIK: But as I understood your responses, your responses were with respect to Hartz. I went over (452) the Hartz matter, I just couldn't conceive of anything beyond 16 years, even being relevant."

At another point, page 470 of the record, without any basis other than to prejudice the defendant, the prosecutor asked Corey:

"Q. Mr. Corey, your name used to be *Cohen*; correct? A. Yes.

"Q. MR. ANOLIK: I object. What is the purpose of this?"

The prosecutor then conceded that Corey had changed his name quite some time before he started to work at Hartz (471).

Corey declared that he had changed his name 27 years earlier, in order to adopt his son, since the natural father of the boy, being Catholic, would not permit the adoption under the name of "Cohen."

The Court could not let the matter drop, although the prosecutor stated that he wanted to drop the matter. The Court declared (475):

"It would be more prejudicial to the defendant to let it drop rather than have him explain why he changed his name."

Thus, the matter was emblazoned on the minds of the jurors, because of the impropriety of the prosecutor.

At pages 508 and 510, AUSA Cooney was permitted to elicit the personal opinion of Leonard Stern, the President of Hartz Mountain Corporation as to the guilt of the defendant. Appropriate objections were, of course, made, as well as a motion for mistrial.

The witness was permitted to say, in summation of his testimony:

"Today what I have seen and heard, I no longer believe he is an honest man.

"MR. ANOLIK: I ask for a mistrial at this point, Your Honor" (509).

It must be borne in mind that Mr. Stern was first called as a witness the very day he testified. (Presumably, therefore, he was called down largely for the purpose of adducing such prejudicial comments).

POINT I.

THE APPELLANT WAS GRAVELY PREJUDICED BY THE CALCULATED TACTICS OF THE PROSECUTION, WHICH WITHHELD AN ALLEGED PRIOR CRIMINAL ACT OF DEFENDANT FROM THE KNOWLEDGE OF DEFENSE COUNSEL, DESPITE INQUIRIES; BY DELIBERATELY INJECTING INTO EVIDENCE THE FACT THAT COREY WAS "JEWISH" BY REVEALING THE FACT THAT HIS NAME WAS ORIGINALLY "COHEN"; AND BY ELICITING AN OPINION AS TO GUILT FROM COREY'S FORMER EMPLOYER.

The testimony adduced at trial from Barney and Krasner consisted primarily of accomplice testimony. It is elementary that under the circumstances, the jury had to be instructed that they were to view this testimony with great care and suspicion.

Since both Barney and Krasner admitted that they had committed crimes completely unrelated to Hartz Mountain, it was obvious that credibility, as between these two culprits and Corey, was a very sharp issue.

This is accentuated by the fact that Corey also produced character testimony as to his good name and reputation.

Apparently the prosecution was not content to leave the issue of credibility to be resolved by the evidence at trial, but embarked upon a calculated design to wage a "trial by ambush" (*United States v. Baum*, 482 F. 2d 1325, 1331 [2 Cir. 1973]; *United States v. Kelly*, 420 F. 2d 26, 29 [2 Cir. 1969]).

In *United States v. Addonizio*, 451 F. 2d 49, 64, n. 16 (3 Cir. 1972), the Court explained:

"Where, however, a defendant seeks legitimate information, he may not be denied it merely because the *effect* of providing it is to divulge the names of the government witnesses or the details of the government's evidence. (Cits. omit.)"

In this regard the prosecution deliberately withheld information from the defense as to an alleged prior crime committed by Corey 16 years earlier, when he was working for a different company, namely CBS. It is not disputed that the defense counsel asked about the background of Corey with respect to any crimes or convictions. AUSA Cooney withheld information he had obtained that Corey was fired from CBS 16 years earlier for allegedly falsifying the overtime to which he was entitled. No criminal charges had been preferred. No opportunity to cure or explain this incident was afforded.

This information was obviously needed before Corey testified so as to evaluate the risks of taking the stand. In the Statement of Facts, we have set forth the colloquy in this sensitive area.

After Corey had finished his direct testimony, and of course, had not been asked about any incident at CBS because counsel was unaware of it, on cross, for the first time, the Government introduced this material. We maintain that the Government committed prejudicial error and denied an opportunity to investigate this aspect of the case. The Court, in the exercise of discretion, permitted the cross-examination, although we believe the Court erred in doing so (464).

The Court denied defense counsel a continuance to investigate this matter. Like *United States v. Baum, supra*, this matter was adduced at the tail end of the trial. It was clearly an "ambush" tactic.

At another point in cross-examination, the Government prosecutor injected into a question a statement that Corey used to be known by the name of "Cohen" 27 years earlier - a fact which could not possibly be relevant to this case and which the Government conceded was a "shot in the dark."

The Court naturally was disturbed, but could not let the matter rest, since to do so would be more prejudicial than to permit Corey to attempt an explanation. Cohen, we submit, is a name identified with persons of the Jewish faith and we regret that this may well have been a calculated tactic. We ask the Court to ponder

whatever possible reason existed, since the event occurred 27 years earlier and could not possibly have had any bearing on this case. Without a reason, the Court should condemn this tactic.

In *United States v. Gregory*, 369 F. 2d 185 (D. C. Cir. 1966), the Court of Appeals aptly condemned such tactics, referring to them as an "evidential harpoon":

". . . The volunteering of inadmissible testimony prejudicial to the defendant has been condemned time and again by both state and federal courts. For example, in *Wright v. State*, Okl. Cr. App., 325 P. 2d 1089, 1093 (1958), where a law enforcement officer injected this type of prejudicial testimony, not twice as here, but only once, the court stated: 'This type of testimony has often been referred to as an "evidential harpoon" that has been wilfully jabbed into the defendant and then jerked out by an admonition to the jury not to consider the same. This court has never condoned, but often criticized a witness being intoxicated with eagerness in an all out effort to obtain a conviction. * * * Officers must be aware that an overzealous attitude is, in

most instances, detrimental to the prosecution and often results in a retrial of the case at considerable expense to the state."*

The same problem was created when the prosecutor adduced from Leonard Stern, Corey's former employer, his opinion that he no longer believed that appellant was an honest man. This was the ultimate question that the jury had to resolve, and it was improper for the Government to call a witness for the obvious purpose of eliciting such an opinion.

Under the foregoing circumstances, it is manifest that Corey was denied a fair trial.

Returning for the moment to the error created by permitting evidence about appellant allegedly having been fired from CBS about 17 years earlier, we wish to remind this Court that apparently the Court rested its decision upon Rule 404 of the Federal Rules of Evidence. The Government claimed that Rule 404(b) permitted the introduction of that evidence. They apparently do not dispute that if the CBS evidence was offered to prove criminal character or disposition, it would be clear error (*United States v. Papadakis*, 510 F. 2d 287, 294-5 [2 Cir.], cert. den. 421 U. S. 950 [1975]; *United States v. Gerry*, 515 F. 2d 130, 140-141 [2 Cir.], cert. denied 423 U. S. 832 [1975]).

* Here an experienced prosecutor did this.

The Government contended, however, that they were seeking to prove motive, intent, knowledge, absence of mistake and so forth (*United States v. Miller*, 478 F. 2d 1315, 1318 [2 Cir. 1973]).

We maintain, however, that there was no basis for such a position. The defense never denied the receipt of the money from Krasner in check form, nor did it deny having received a check from Barney.

There was no issue of motive, identity, intent, and so forth. The issue boiled down to one of credibility. The nature of the offense at CBS involved the overstatement of overtime. It did not involve kickbacks or commercial bribery. Moreover, it was so remote in time that its potential for prejudice grossly outweighed its probative value (*United States v. Leonard*, 524 F. 2d 1096 [2 Cir. 1975]). The Government sought to infer a criminal bent.

We recognize that the Trial Judge has some discretion, but in this case we believe the discretion was abused (*United States v. Leonard*, *id.* at 1091, 1092). We do not believe that the conduct was so similar as to be relevant (*United States v. Santiago*, 528 F. 2d 1130, 1134 [2 Cir. 1976]).

An accused is entitled to a fair trial under the due process clause. (*Adamson v. California*, 332 U. S. 46, 53, 171 A. L. R. 1223, reh. den. 332 U. S. 784, overruled on other grounds; *Malloy v. Hogan*, 378 U. S. 1; see also, *Chambers v. Mississippi*, 410 U. S. 284).

POINT II.

THE JURISDICTION OF THIS CASE WAS NOT PROPERLY WITHIN THE AMBIT OF THE FEDERAL COURTS. THE UNDERLYING CRIME WAS COMMERCIAL BRIBERY, WHICH, UNDER THE CIRCUMSTANCES HEREIN, WAS A STATE CRIME.

This case, like *United States v. Archer*, 486 F. 2d 670 (2 Cir. 1973), and *United States v. Regent Office Supply Co., Inc.*, 421 F. 2d 1174 (2 Cir. 1970), should have been left to prosecution by State agencies. The jurisdiction was contrived and artificial.

The basis of the charge in the case at bar was the commission of a State crime involving commercial bribery or kickbacks.

The Government, apparently concerned that the United States Courts do not have enough business to keep them busy, contrived a prosecution in this purely State crime, by invoking the wire and mail fraud provisions of Title 18 and, of course, the traditional "darling of the prosecutor's nursery," - conspiracy.

In the *Archer* case, *supra*, this Court would not tolerate such tactics. Similarly, was the case in *United States v. Regent Office Supply Co., Inc.*, *supra*.

See also, *United States v. Erecht*, 540 F. 2d 45 (2 Cir. 1976).

POINT III.

THE PROOF AT TRIAL, IF IT REVEALED ANY CONSPIRACY AT ALL, DEMONSTRATED THE EXISTENCE OF TWO, AND NOT ONE, CONSPIRACY. THE COURT BELOW DECLINED TO CHARGE ON MULTIPLE CONSPIRACIES AND REFUSED TO DISMISS THE CONSPIRACY COUNT.

We maintain that if any conspiracy was proved, at least two conspiracies existed. The transactions with Krasner were completely separate and apart than those with Barney.

While it is our position that the Government did not even prove its case and that the Court should have granted the Rule 29 motion to dismiss (*United States v. Taylor*, 464 F. 2d 240 [2 Cir. 1972]), at least a charge on multiple conspiracies should have been given as requested.

Barney and Krasner were not affiliated and, apparently, did not even know each other, and certainly were unaware of the activities of each other vis-a-vis Corey.

Under the circumstances, we maintain that under *United States v. Bertolotti*, 529 F. 2d 149 (2 Cir. 1975), a multiple conspiracy charge at least should have been articulated, and that the Court should have dismissed the conspiracy count altogether.

CONCLUSION.

The judgment of conviction should be reversed.

Respectfully submitted,

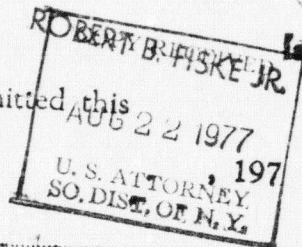
IRVING ANOLIK,
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Appellant.

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